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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/761,632

01/21/2004

Laurence D. Bell

3324

26874 7590 01/24/2007  
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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

PAPER NUMBER

1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

01/24/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/761,632

Applicant(s)

BELL, LAURENCE D.

Examiner

Steven L. Weinstein

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 07 November 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) 27-32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>3/29/04</u> . | 6) <input type="checkbox"/> Other: _____  |

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Applicant's election with traverse of Group I, claims 1-26, in the reply filed on 11/7/06, is acknowledged. The traversal is on the ground(s) that the package as claimed is designed for carrying out the method and that one would not use the package for other items. This is not found persuasive because this is not the criteria for restriction. As detailed in the Office action mailed 10/23/06, the package is recited as having a capability, but, in fact, can be used to package products other than food, such as horticultural products. Note that horticultural products have the same respiration issues as does food products. The package could even be used to package non-living products such as medical or surgical articles, etc. It is also urged that there is no serious burden. This urging is also not convincing. A prima facie case of serious burden exists by just showing the inventions have a separate status in the art as evidenced by their separate classification. An urging that there may be some overlap in the search is not sufficient to overcome the restriction. It is noted that most proper restrictions deal with groups of claims that have some overlap.

The requirement is still deemed proper and is therefore made FINAL.

Claims 1-26 are rejected under 35USC112, 1<sup>st</sup> paragraph for being non-enabling. The phrase "equilibrates with the atmospheric gas composition" appears to be confusing and inconsistent. What is the "atmospheric gas composition"? Normally, atmospheric gas composition refers to the gas composition of the ambient air, outside a receptacle or confining means, unless that receptacle or confining means is itself open to air. Atmospheric air has less than 1% CO<sub>2</sub>. Therefore, if the atmosphere inside the package is said to

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equilibrate to atmospheric gas composition, then that means the atmosphere in the package would be less than 1% CO<sub>2</sub>, which is not what is disclosed.

Clarification and/or correction is requested. Also, since the initial total gas composition in the package is not recited and it is not clear what the equilibration is in reference to, it would not be clear what permeability is necessary to achieve this nebulous result. For purposes of examination, and to expedite prosecution, the "equilibration" is being construed as an approximate, steady state type condition. Further, as disclosed, the invention appears to be employing conventional high permeable gas packaging material, which will inherently cause a reduction in the antimicrobial gas from its initial levels, particularly if the gas is CO<sub>2</sub>. Note, however, most of the claims do not positively recite that there is any reduction in the so-called antimicrobial gas.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3,5,6,8-13,21, and 24-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Bailey (5,565,230).

In regard to claim 1, Bailey discloses a process for packaging perishable food products comprising placing the food products in a package, at least a portion of which is gas permeable (e.g., "low barrier" material) and adding an

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antimicrobial gas into the package at a level within the recited range of the atmosphere contained within the package and wherein the package has a permeability such that the atmosphere in the package reaches an equilibrium range within the recited range and within the recited temperature. Note, for example, that Bailey discloses the package atmosphere reaches a steady state concentration within a week, the gas which is added is CO<sub>2</sub>, the CO<sub>2</sub> inhibits mold and decay, and the low barrier packages allows CO<sub>2</sub> to escape to prevent excessive log term high levels which would be harmful to the product. In regard to claim 2, Bailey discloses respiring produce, e.g. cherries. In regard to claim 3, Bailey discloses whole produce. In regard to claim 5, Bailey discloses the food is a low acid fruit. In regard to claim 6, Bailey discloses a storage temperature within the recited range. In regard to claims 8-11, Bailey discloses the initial concentration of antimicrobial gas within the recited range and that the gas is CO<sub>2</sub>. In regard to claims 12 and 13, although "no more than" reads on zero, nevertheless, Bailey discloses a rough, steady state concentration of gas within the recited range. In regard to claim 21, Bailey discloses injecting the gas. In regard to claims 24 and 25, Bailey discloses both gas permeability of the packaging material as well as perforations for controlling the gas atmosphere in the package. In regard to claim 26, which recites that the packaging materials are microporous, the permeable materials of Bailey are considered to be microporous.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4,7,14-20,22, and 23, are rejected under 35 U.S.C. 103(a) as being unpatentable over Bailey ('230).

Claim 4 recites that the food item is fresh cut produce. Once it was known to preserve produce (which is known to respire and be subject to the harmful effects of bacteria), by exposing the produce to a high concentration of CO<sub>2</sub> in a package, which is then allowed to equilibrate to a lower level after a number of days by employing a low permeable packaging material, it would have been obvious to employ the same technique on cut produce, since it was notoriously well known that fresh cut produce respire and is subject to bacteria just as is whole produce (and perhaps even more so). Similarly, in regard to claim 7, which recites a number of specific fruit, the particular fruit selected is seen to have been an obvious matter of choice, since all produce respire, and all produce are subject to bacterial contamination. In regard to claims 14-20 which recite various process variables, once it was known to provide an initial large concentration of CO<sub>2</sub> to a gas permeable package containing produce, which respire and is subject to bacterial contamination, and then allow the CO<sub>2</sub> to reach a lower, preserving concentration in the time period of no more than a week under refrigerated conditions, the particular specific variables detailed by Bailey are seen to have been result effective variables, routinely determinable. In regard to claim 22, Bailey discloses the notoriously conventional step of sanitizing the

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produce, which would be even more imperative if the produce was to be cut up and its interior flesh exposed. In regard to claim 23, Bailey discloses the conventionality of an antimicrobial (e.g. chlorine) dip.

The remainder of the references cited on the PTO892 form are cited as pertinent art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday 7:00 A.M.-2:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Steve Weinstein  
STEVE WEINSTEIN  
PRIMA... EXAMINER 1761  
1/22/07